Supreme Court, U.S.
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No. 84-1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JIMMY C. ROSE, WARDEN,

Petitioner,

v.

STANLEY BARHAM CLARK,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In a murder trial can jury instructions, which told the jury it was to presume malice and intent to kill from the fact of the killing alone and shifted to the accused the burden of rebutting the presumed malice and intent, be deemed harmless beyond a reasonable doubt where the accused did not concede that a malicious killing had occurred, relied upon the presumption of innocence and presented a mens rea defense?

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SUMMARY OF RESPONDENT'S ARGUMENT

1. Respondent was charged with first degree murder. By his defense he sought to require the State to prove every element of the offense beyond a reasonable doubt. He *contested the issue of malice* and intent and *did not admit* that a malicious killing had occurred and did nothing to lesson the prejudicial effect of the unconstitutional errors contained in the Court's erroneous jury instructions. Those *instructions told the jury that from proof of an unlawful killing and/or use of a deadly weapon the law presumes that the defendant was of a state of mind to do the unlawful act without legal excuse or justification* and that the accused had malicious intent. The Court defined malicious intent as (1) the intent to do injury to another, (2) a design formed in the mind of doing mischief to another, (3) that he actually contemplated the injury or wrong he inflicts, (4) that the condition of his mind indicates a wicked, depraved and malignant spirit fatally bent on mischief, and (5) that it was a consciously unlawful act done intentionally. *These instructions unconstitutionally relieved the State of its burden of proving malice and intent which were necessary elements of the offense charged. Mullaney* v. *Wilbur*, 421 U.S. 684, 93 S.Ct. 1881, 44 L.Ed.2d (1975); *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In Re Winship*, 397 U.W. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Connecticut* v. *Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983); and *Francis* v. *Franklin*, ___ U.S. ___, 105 S.Ct. 1965 (1985).

These instructions likewise unconstitutionally *shifted the burden* to the respondent *to rebut* the presumption of malice and intent *by showing* self-defense, *provocation* or mitigation in violation of the holding in *Mullaney* and *Sandstrom*.

2. The erroneous and unconstitutional instructions on presumed malicious intent totally negated his mens rea defense that he lacked malice and likewise negated his insanity defense. The erroneous instructions further denied respondent the constitutional right to defend soley upon reliance on the *presumption of innocence* and the *State's burden of proof* and were the *equivalent of a directed verdict* on the issue of malice as well as

an *impermissible comment on the weight of the evidence. Connecticut* v. *Johnson; Shockley* v. *State*, 695 SW 2d 754.

3. Where, as here, the issues resulting from the unconstitutional jury instructions related to a contested element of the offense charged, such error could never be considered harmless regardless of how strong the evidence was deemed to be; and since the erroneous instructions do involve a contested element of the offense, there is *no issue* before this Court as to whether or not a *Sandstrom* error can ever be harmless under hypothetical facts or circumstances not present in this case. Moreover, the *Federal Courts* below *did, in fact, evaluate* the error based upon the Sixth Circuit's harmless error doctrine under *Chapman* v. *California*, 386 U.S. 18 (1967) and determined that the error in this case could not be deemed harmless. Furthermore, the evidence of guilty intent is *not overwhelming* but to the contrary the evidence was contradictory and there is no credible evidence as to how the deaths came about, or who provoked the dispute. The evidence, in fact, indicated that the incident may have arisen out of a dispute, fight or mutual combat resulting from an explosion of passion or anger rather than malice and/or due to respondent's intoxification and mental illness.

4. The *Federal Courts* below did not misinterpret or misapply Tennessee law. Issues as to respondent's *insanity, amnesia* and *intoxication*, were raised by the proof and *were relevant* to the jury's considerations even under the established Tennessee law. Furthermore, the prior Tennessee decisions upon which the petitioner relies were based upon the doctrine of presumed malicious intent and the presumption that every person is presumed to intend the usual and natural consequences of his acts, both of which doctrines have now been declared unconstitutional by the Supreme Court's decisions of *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Mullaney Wilbur*, supra; and *Sandstrom* v. *Montana*, supra; so that the *State must actually prove malicious intent* as an element of the crime and any factors bearing upon that mental state would be relevant, including mental illness, amnesia and intoxication. To deny the jury the opportunity to consider such evidence

bearing upon his actual state of mind in order to refute the State's claim of malicious intent would violate Respondent's due process right to present his own version of the facts as well as the prosecution's so that the jury may decide where the truth lies. *Washington* v. *Texas*, 388 U.S. 14; *Chambers* v. *Mississippi*, 410 U.S. 284.

5. The State's attempt to distinguish between volitional impairment and cognitive impairment is contrary to Tennessee law and ignores the established doctrines that a person, who cannot control his conduct due to mental illness, is incapable of forming criminal "intent" because his acts do not proceed from a free will choice or a mind free to act.

6. The *fact that the jury found defendant guilty of first degree murder* which included premeditation, does not mean that the jury would have found malice even without the erroneous presumption. The Tennessee Supreme Court in *State* v. *Martin* which was just decided on December 30, 1985, clearly held that malice is a necessary element of both first and second degree murder and cannot be presumed, and that jury instructions on malice, identical to those in the present case, are unconstitutional and prejudicial. The Court in *Martin* held that the defendant's conviction must be reversed because of this erroneous instruction on malice, even though the Court expressly found that the *proof was sufficient to establish premeditation*, and the evidence of guilt was great.

COUNTER-STATEMENT OF THE CASE

Respondent was charged with two counts of wilful, deliberate malicious and premeditated murder as a result of the shooting deaths of defendant's former girlfriend, Joy Faulk and a man she was with, Charles Browning on January 30, 1978. The jury returned a verdict of murder in the first degree for the death of the woman and murder in the second degree for the death of the male victim.

1. THE EVIDENCE

The state's proof consisted of circumstantial evidence which established that the pistol used in the slayings had been loaned

to the Respondent the week before Christmas 1978, i.e. several days before the deaths occurred (J.A. 74), that Respondent had previously threatened the woman (J.A. 48, 50, 56, 58, 61), and that a police officer had seen Respondent's truck following only five or six feet behind the victims vehicle earlier on the evening of the deaths (J.A. 14, 15). The only eyewitness to testify was Mitzi Faulk, the 6 year old daughter of the female victim. Mitzi stated that the accused had shot her mother though she admitted that the male victim was also carrying a gun. (J.A. 34) On cross-examination, the child gave such contradictory statements that the trial judge ruled she had been impeached as a matter of law (J.A. 39) and he then allowed the testimony of two other witnesses who had picked up the child shortly after the deaths and who testified that the child Mitzi had stated that her mother had been killed and that the Respondent and Browning had guns and were fighting (J.A. 39-43). The child, after acknowledging that she had been told what to say in Court by her father (Tr. 219, 220, 233, 234), stated that defendant's truck had been behind them for an hour (i.e. supposedly the same one that the police officer said had been following only five feet behind), nevertheless, she said nobody in her vehicle even said anything about the truck (Tr. 224, 225). She stated that she could tell the color of the truck because it was half-way daylight or sunlight (Tr. 225, 226) and then later she changed her story and said that she could see because the moon was shining bright (Tr. 248) even though it was after 9:00 p.m. (J.A. 14) and the investigating police officer said it was a "very dark" rainy night (Tr. 48). The child said that she had seen one of the victims take out a gun and put it back in his pocket (Tr. 226, 227), but she denied the statement testified to by the supposed corroborating witnesses, i.e. "They have guns. They are fighting" stating she had not made such a statement to anybody (Tr. 232). She admitted she had told different people "that different people did it" (Tr. 251) and finally again acknowledged that her daddy had told her the questions that were going to be asked and the answers she should give in Court, saying"

> "Q. He told you to say Clicker shot your mama, is that right or am I wrong?
>
> A. You're right.

Q. Your daddy told you to say that, is that right?

A. Witness nods in the affirmative.

Q. And he told you to say Clicker shot Mr. Browning, is that right? (witness nods in the affirmative)." (Tr. 253-255).

The police found a gun with one spent cartridge in victim Browning's pocket (J.A. 30) and also acknowledged that they had found an additional .25 cal. shell casing at the scene but had lost it and they could not say what gun it had been fired from (J.A. 31).

The Respondent presented the testimony of two psychiatrists who said that defendant had suffered from chronic headaches (J.A. 92) and stated their opinions that, assuming that the accused did shoot the victims, he had buried all knowledge, memories and recollections of the events due to total amnesia and was unable to recall the events (J.A. 87, 119, 139) and that in their opinions if he committed the acts charged he was not legally responsible for his acts because of mental illness which rendered him unable to conform his conduct to the requirements of the law (J.A. 87, 122).

The prosecutor through State witness Sylvia Barrett brought out that Respondent had been drinking heavily (J.A. 63, 64) and when Respondent is drinking he's high tempered and gets upset easily (J.A. 69) and that even when he was not drinking Respondent had seemed nervous for the last year. (J.A. 69). On cross-examination of Ms. Barrett Respondent's counsel further emphasized Respondent's heavy drinking (J.A. 64) and elicited from Ms. Barrett that in the days immediately before the killings occurred, the Respondent had talked strange, seemed depressed, would start crying, one moment he would like to see his girlfriend (i.e. victim Joy Faulk) whipped and in the next moment would say "I love her and wouldn't want to see her hurt" and "I don't want to hurt anybody. I wouldn't want to hurt her." (J.A. 67) Mrs. Barrett further testified that the defendant "acted like he really didn't know what he was doing" (J.A. 67), said he had told her of nightmares about his service in the Vietnam War and seeing people and droves of sheep coming at him (J.A. 67, 68). She stated that

during the past year he had lost 35 pounds and seemed awfully depressed like a different person (J.A. 68-70, Tr. 524). Thereafter during the State's cross-examination of defense psychiatrist Dr. Griffin, the prosecutor brought out the fact that the defendant had told Dr. Griffin he had consummed some thirty-six (36) beers on the day the shooting occurred (J.A. 97, 98).

2. RESPONDENT'S THEORY

Respondent did not take ths stand and nowhere conceded that the deaths were committed in a malicious manner but to the contrary, Respondent submitted proposed jury instructions that would have allowed the jury to consider evidence of his intoxication and mental state to rebut the state's evidence of malice but those instructions were denied by the Court (Tr. 1103, 1104; R. 110, 111, 112, 116).

The Respondent's counsel in opening statement told the jury that Respondent, due to total amnesia, had no recollection of the events and that if the evidence in fact should establish that Respondent committed the acts, then due to his mental condition he could not be found guilty (J.A. 7, 8).

Though Respondent's counsel hypothesized that Sam Faulk or some other person had a motive and opportunity to commit the crime (Tr. 23), in closing argument Respondent's counsel pointed out that he was not there and due to amnesia Respondent could not testify as to what occurred and accordingly, no one really knew what had happened:

> "That can mean only one of two things: Either he did not do it, and therefore has no way to remember something that didn't happen, or (2) he did do it, and he simply does not remember, he can't tell you about it (Tr. 1041). I can't tell you what happened; Stanley can't tell you what happened. But we can say to you one thing: you certainly haven't heard what happened by any competent or any convincing or satisfying proof in this Courtroom" (J.A. 173)

and

> "Now where the truth lies and where it is I can't honestly tell you, I don't honestly know, but I do know you have not

> heard the truth from that witness stand. You haven't heard hardly a witness come in here who didn't say something just totally self-serving and contradictory. You haven't heard a witness come in here who could testify about anything material, anything real or truthful that was not a variance with what some other witness said" (J.A. 175).

The defense further argued that the evidence showed that the State's child eyewitness, Mitzi Faulk, had said immediately after the shooting occurred that "They were fighting, they had guns" (J.A. 172, 176); that the State having found a fifth shell which its investigators thereafter lost, that this indicated there had been a fight and another gun involved in the fight (J.A. 176 and Tr. 1051); and that the evidence depicted the accused's mind to be that of a person who was depressed, unable to sleep, throwing up, crying, and emotionally ill (J.A. 174), and stated "you can't convict somebody because he can't remember what he did . . ." (J.A. 174).

Respondent's counsel further stated in closing argument:

> "Now you can't make me prove that Stanley is innocent. I don't think that I can do that . . . I don't think there is any way, as long as I can't even find out if he was there. If he was there, he has no recollection of it, so I can't find the facts" (J.A. 175)
>
> ". . . I submit to you if you have a reasonable doubt about any aspect of this case that is material and that the prosecution has to prove, then it is your duty to find the defendant not guilty" (J.A. 175).

3. THE JURY INSTRUCTIONS

In its charge to the jury the Trial Court instructed on the issue of murder in the first degree by informing the jury that to convict of that offense the State must have proven that (1) the defendant unlawfully killed the victim, (2) that the killings were malicious, (3) that the killings were willful, (4) that the killings were deliberate, and (5) that the killings were premeditated. (J.A. 184, 185) The definition given of the term malice in the instructions on first degree murder was as follows:

> "(2) That the killing was malicious: that is the defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse. If it is shown beyond a reasonable doubt that the alleged victims were killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption." (J.A. 184, 185)

The Court further instructed the jury that the mental state of the accused must be considered carefully to determine if he was sufficiently free from excitement and passion to be capable of premeditation (J.A. 185).

Thereafter, the Court instructed the jury on the offense of murder in the second degree at which time it stated that malice was a necessary element of that offense and further instructed the jury as follows:

> "All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence or both, regardless of whether the same be offered by the defendant or exists in the evidence of the State.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances. A deadly weapon is any weapon or instrument which from the manner in which it is used or attempted to be used is likely to produce death or cause great bodily injury." (J.A. 187, 188).

In its charge on murder in the second degree, the Court specifically defined malice as follows:

> "Malice is an essential ingredient of this offense, and it may be either express or implied. A case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought, exists in the mind of the slayer. Malice is an intent to do an injury to another, a design formed in the mind of doing mischief to another.
>
> Express malice is actual malice against the Party slain and exists where a person actually contemplates the injury or

wrong he inflicts. Implied malice is malice not against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignent spirit, and a heart regardless of social duty and fatally bent on mischief.

Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In this event there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice." (J.A. 186, 187).

4. POST-TRIAL PROCEEDINGS

Respondent appealed his conviction and assigned the improper malice instructions as error alleging violation pursuant to *Sandstrom* v. *Montana*, 442 U.S. 510, (1979) but the Tennessee Court of Criminal Appeals ruled that the instructions were not erroneous and affirmed the conviction (A-37) and defendant's request for permission to appeal to the Tennessee Supreme Court was denied (A-40). Respondent then filed a petition for habeas corpus and the United States District Court granted the writ and ordered a new trial, agreeing with Respondent's contention that the instruction on malice violated due process under *Sandstrom* (A-21). The State then appealed to the United States Sixth Circuit Court of Appeals but that Court affirmed the decision of the District Court (A-6). The Supreme Court then granted the State's Petition for Writ of Certiorari limited solely to the issue of whether the erroneous instructions on malice were harmless beyond a reasonable doubt.

I.

UNDER THE CIRCUMSTANCES OF THIS CASE THERE IS NO ISSUE THAT WOULD PERMIT A FINDING OF HARMLESS ERROR.

A. An Erroneous Presumption On A Contested Element Of The Offense Charged Can Never Be Harmless Since It Is The Equivalent Of A Directed Verdict On That Element And An Impermissible Comment On The Evidence.

Without conceding that there could ever be some hypothetical situation in which the harmless error doctrine could

apply to an instruction creating a mandatory rebuttable presumption on a necessary element of the crime charged, respondent earnestly insists that no such issue is before this Court because under the facts of the present case the element of the offense at issue, i.e. malice, was a contested issue and had not been conceded. Accordingly, there is no need nor indeed is there any reason to discuss the arguments pro and con as to whether there are conceivable circumstances which might justify a determination that such an instruction was harmless.

As the State, i.e. Petitioner, belatedly acknowledges, in a criminal prosecution the State has the burden of proving every element of the offense beyond a reasonable doubt. Presumptions which relieve the State of that burden deny the defendant due process. *Francis* v. *Franklin*, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Connecticut* v. *Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983); *Patterson* v. *New York*, ____ 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *Barnes* v. *United States*, 412 U.S. 537, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973); *In Re Winship*, 397 U.S. 385, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Petitioner contends that policy considerations should dictate the result in this case and should deprive the accused of the new trial which was granted by the Federal District and Sixth Circuit Courts. While it is obviously true that society has an interest in avoiding duplication of a proceeding which was not adversely affected by the error, it is just as obvious that to deprive the accused of a fair trial, where an element of the offense was presumed and the burden of proof shifted to the defendant, can hardly promote the public's respect for the law and administration of justice, and to require that the accused receive a new and fair trial protecting these fundamental concepts of due process in no sense constitutes a "windfall."

In *Francis* v. *Franklin*, 105 S.Ct. 1965 (1985), this Court was presented with an issue relating to a jury instruction in which the jury was told to presume the issue of intent. There the Court after reviewing the matter in light of prior holdings

in *Sandstrom* v. *Montana*, 442 U.S. 510, *In Re Winship*, 397 U.S. 358, *Mullaney* v. *Wilbur*, 421 U.S. 684, *Morrissette* v. *U.S.*, 342 U.S. 246, *Patterson* v. *New York*, 432 U.S. 197, *Ulster County* v. *Allen*, 442 U.S. 140, *Cupp* v. *Naughton*, 414 U.S. 141 and various other decisions, reiterated the essence of *Sandstrom*, that due process prohibits the State from using jury instructions that create evidentiary presumptions which have the affect of relieving the State of its burden of persuasion beyond a reasonable doubt as to every essential element of a crime, noting that "it is far worse to convict an innocent man than to let a guilty man go free." The Court further concluded that

> "An irrebuttable or conclusive presumption relieves the State of its burden of persuasion by removing the presumed element from the case entirely if the State proves the predicate facts. A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective but it is no less unconstitutional. *Our cases make clear that such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the due process clause.*" *Franklin*, supra, 105 S.Ct. at 1972. (Emphasis added).

This Court in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983) in the plurality opinion, recognized that an instruction creating a presumption with respect to an unconceded element of the offense cannot be harmless because it amounts to a prohibited directed verdict of guilty, as to the issue of intent. It is invalid because it can either lessen the government's burden of proof or unconstitutionally shift the burden of proof to the accused.

The United States concedes that if a Trial Court directed the jury to return a verdict of guilty, a reversal could not be avoided by showing that the trial was in all other respects fair and the Judge's verdict fully reliable, nevertheless the government

asserts that in the present case the State Trial Judge did not enter a directed verdict because he told the jury it was to choose one of six separate verdicts and that, therefore, the respondent was not deprived of his right to a jury trial. This is simply a non sequitur and defies common understanding. If the jury starts out in its deliberations being told by the Court that the accused is presumed to have had malicious intent, it is only logical and natural that the jury would feel that it was required to find the existence of the element of malice.

Moreover, the case here is much stronger for the defense because the accused did not take the stand and according to his own proof was incapable of presenting evidence regarding what actually occurred at the time of the deaths. Since the accused had no way of presenting rebuttal evidence as to what occurred, the jury, under the charge, had no alternative but to heed the Court's instructions and presume the defendant guilty of having malicious intent. If that circumstance is not the functional equivalent of a directed verdict on the issue of intent, then this Court's prior opinions in *Sandstrom* and *Johnson* are rendered meaningless.[1]

All of the various circumstances pointed to by the United States in its attempts to argue against the directed verdict effect of the instructions simply to do nothing more than raise the same arguments which were presented to and rejected by this Supreme Court in the previous cases in which *Sandstrom* errors were found, and the government's arguments simply ignores the clear language of this Court in *Sandstrom*,

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[1] The Court could not have been any clearer in *Johnson* when it stated,

"And *Sandstrom* makes it clear, we think, that a conclusive presumption on the issue of intent *is a functional equivalent of a directed verdict on that issue*.

In *Sandstrom* the jury was instructed that the law presumes that a person intends the ordinary consequences of his voluntary acts. 442 U.S. at 512, 99 S.Ct. at 2453. We held that instruction unconstitutional because a reasonable juror might have viewed it as creating a conclusive or burden-shifting presumption of innocence and prove beyond a reasonable doubt that the defendant had intended to kill *the jurors might have believed that upon finding certain preliminary facts, they were directed to find against the defendant on the element of intent. Connecticut* v. *Johnson*, supra at 523. (Emphasis added).

Johnson, *Patterson*, and *Franklin*. Furthermore, when the jury is instructed that they shall presume guilt from certain facts alone, if found, *the instruction is inescapably an impermissible comment on the weight of the evidence*. *Shockley* v. *State*, 695 S.W.2d 754, 757 (Tex. App. 1985).

Finally, dispositive of the issue is the Tennessee Supreme Court decision handed down on December 30, 1985, in the case of *State* v. *Martin*, a copy of which is attached as an Appendix to Respondent's brief. There it was affirmatively determined that the very identical instructions given in the present case are erroneous and require the granting of a new trial. The Court in ruling held "that a reasonable juror could have misunderstood the instructions on malice, and that they were not constitutionally sufficient in light of *Sandstrom* and *Francis*." It held that the instructions could not be deemed harmless beyond a reasonable doubt *even though the jury found the accused guilty of a premeditated first degree murder and despite the Court's conclusion that the evidence was sufficient to establish and justify a finding of premediation*. Accordingly, as will be shown hereinafter, the entire rationale of the petitioner's case and its arguments have now been wholly invalidated by the Tennessee Supreme Court itself.

B. The Nature of Respondent's Defenses Did Not Eliminate The Issue Of Malice And Intent And Respondent Was Entitled To Rely Upon The Presumption Of Innocence And The State's Burden Of Proof.

The government states that in the present case unlike *Francis*, the Trial Court's instructions on malice did not completely eliminate any of the respondent's "chosen" defenses. That, too, simply ignores the fact that counsel for the accused did not in any way limit his defenses but rather he specifically told the jury that: (1) if they had any doubt as to *any aspect of the case* that the prosecution had to prove, it had a duty to find him not guilty (J.A. 175); (2) that the jury could not rely upon the credibility of the State's witnesses and thus, could not say how the offense had occurred (J.A. 173, 175); and (3) that even if the accused were present and committed the acts alleged, he was

unable to state what, in fact, happened to cause the shootings to occur (J.A. 173-175). As the District Judge noted,

> "From the outset of the trial, it was clear that the defense was unlikely to concede anything, rather that it intended to put the state to its burden of proving beyond a reasonable doubt every element of the offense as charged, physical as well as mental. (Petition for Writ of Certiorari, A-17). (Emphasis added).

The fact that the defendant suggested that there were other persons who had motive and opportunity to commit such acts, and that the accused was mentally ill and not responsible for his actions, even if he did shoot the victims in no way conceded that the deaths were the result of a malicious criminal act. To the contrary, *defense counsel even went so far as to submit three proposed jury instructions specifically seeking to permit the jury to consider evidence of his mental state bearing upon his ability to harbor or formulate malice or intent*, but these instructions were refused by the Court (Tr. 1104; R. 110, 111, 112, 116).[2] Likewise, defense counsel specifically argued to the

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[2] The specific proposed jury instructions which Respondent submitted but which the Court refused to give relating to his capacity to formulate malice or criminal intent were:

". . . If you find that the defendant has presented evidence which shows that he was suffering from mental disease or defect but that this disease or defect was not sufficient to render him legally insane, still you may consider whether the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired or diminished as a result of mental disease or defect which *so affected his judgment that the defendant lacked* the necessary premeditation or specific intent for a conviction of first degree murder, and *the necessary malice aforethought for a conviction of second degree murder.*" (R. 110).

". . . If you find that the defendant's mental capacity was so diminished that you have a reasonable doubt as to *whether he could be guilty of* that *malice* which is an essential requirement of murder in the second degree, you cannot find him guilty of murder in the second degree." (R. 111).

". . . If you find that the defendant killed while suffering from mental disease or defect so great as to *render him unable to formulate a specific intent to kill or to harbor malice*, but not so great as to render him insane, his killing involuntary manslaughter." (R. 112).

"Should you find the defendant guilty of any degree off murder or manslaughter evidence of a diminished capacity, in assessing the punishment to

jury "*You can't convict somebody because he can't remember what he did*, just as the fact that he doesn't remember what he did doesn't mean he didn't do it" (J.A. 174). He continually sought to show that the deaths were the result of a fight and that the true facts as to what actually happened had not been presented because the accused, if he was present, had amnesia and the child eyewitness was so contradicted that her credibility was impeached and her account of the events could not be believed (J.A. 172-176). To deny this mode of defense would completely negate the principles stated by this Court in *Connecticut* v. *Johnson*, *supra* that,

> "We note that a defendant in a criminal trial is justified, of course, in defending solely in reliance on the presumption of his innocence and the State's burden of proof." *Johnson*, supra.

C. The Evidence Is Not Overwhelming As To The Issue Of Intent; Furthermore, The Weight Of The Evidence Is Irrelevant.

Petitioner says that even without the testimony of the child eyewitness, the evidence clearly establishes that whoever was responsible for the slayings acted with malice. That simply is not so.

The State has approached the issue from the standpoint of resolving every contested fact in its favor, which would be consistent and a proper means of analysis if the issue were simply the sufficiency of the evidence to sustain the verdict, however, it is wholly inappropriate when the review is for the purpose of determining the effect of a constitutional error upon the conviction at issue. The view of the evidence taken by the petitioner simply seeks to disregard any opposing view of the evidence and instead replace it with petitioner's own view that its interpretation is absolutely correct and is the only view

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be imposed on the defendant, *you may consider whether the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was substantially impaired* as a result of mental disease or defect which was insufficient to establish a defense to the crime but which *substantially affected his judgment.*" (R. 116).

which is permissible upon the facts of the record in this case. While it is true that the issue before the Court presupposes that the identity of the accused as the one who fired the shots which killed the victims is established, that finding alone hardly eliminates the jury's inquiry as to the *intent* of the perpetrator, the *manner* in which the deaths occurred and the *credibility* of the State's evidence, as to the elements necessary to a finding of guilt of murder in either the first or second degree.[3]

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[3] Illustrative of the numerous and unjustified factual assertions is the State's position that after the discovery of the bodies defendant was apprehended following a high-speed chase during which he disgarded the murder weapon. However, the evidence, in fact, established only that after the officers observed the accused's vehicle, the accused drove off away from his home and was stopped after he had traveled only three-quarters of a mile during which time the officers themselves had had to turn their vehicle around and pursue him. It was only the officers who drove at a high speed and even they did not go over 50-60 miles an hour; they overtook the accused and he stopped (J.A. 10, 11). There is nothing in such conduct as would indicate that the accused even exceeded the speed limit much less that he was involved in a high-speed chase or any inference of guilt.

Likewise, though the gun was found several weeks later on the side of the road in the area where defendant's car had traveled (Tr. 546-548), the officers did not observe the accused dispose of the gun and did not even know of its existence or whereabouts until several weeks later (Tr. 127). Thus, there is nothing to show that the gun was disposed of during the time that he was being sought by the police officers and, in fact, it could well have been disposed of much earlier that evening and under circumstances which are unknown. This would be consistent with defendant's evidence of his amnesia and the psychiatric testimony that the accused suppressed and blocked from his mind all thought or recollection of the events related to the deaths of the victims. When viewed in that light it would certainly not be evidence of a guilty mind or even a conscious effort to cover up the crime.

The government further states that defendant borrowed the gun used in the killings from a friend and then made up a "bogus" story that his own gun had been stolen. There is simply nothing in the record to compel such a conclusion. The evicence concerning this matter was that before Christmas defendant told a friend, i.e. Mr. Hill, that his own pistol had been stolen and that he needed to borrow a pistol (J.A. 80); and on the night of December 26th when defendant discovered his front door open he told Sylvia Barrett that his own pistol had been stolen (J.A. 63). However, contrary to the inference suggested by the State, Respondent did not go into detail with Ms. Barrett about the theft of his pistol and did not discuss whether or not he had had a pistol stolen before Christmas in a previous break-in (J.A. 71). When viewed

Even in the absence of evidence of intoxication or mental illness, the mere fact that the victims were shot at close range would hardly establish that the killings were the result of malicious intent. In Tennessee the jury always has the prerogative to convict of the lesser offense of manslaughter rather than murder. *Howard* v. *State*, 506 S.W.2d 951 (1973). The Trial Judge himself instructed the jury in accordance with Tennessee law that defendant would only be guilty of manslaughter if the killings resulted from an attempt of the perpetrator to save his own life or prevent bodily harm to himself or when the intent to kill is produced by anger, "for if it were sudden and upon reasonable provocation the killing might or might not be manslaughter, but it would not be murder." (J.A. 188), and the

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from the defendant's posture Ms. Barrett's testimony was consistent with his story that he borrowed Mr. Hill's pistol because his own pistol had been stolen. There is nothing sinister in that circumstance and certainly nothing that would warrant a conclusion that he was premeditating a crime. Such devious attempts would be inconsistent with the alleged open threats and the killing of the victims in plain view of the eyewitness, Mitzi, who knew him well and would certainly be in a position to identify him.

The State also asserts that the defendant himself disagreed with the diagnosis of amnesia because he said he knew where he was that night; however, this was not inconsistent with the diagnosis of amnesia as testified by defense psychiatrist who stated that if, in fact, he committed the acts he had suppressed all *conscious awareness* of it, and they said this was consistent with amnesia (J.A. 118, 119, 122, 137, 139).

Of even more significance, however, is the State's implication that the Court and jury were required to find that the eyewitness' testimony was accurate. While the finding of guilt by the jury obviously indicates that they identified the defendant as the perpetrator of the crime; nevertheless, this could have been based simply upon the fact that the gun used in the killings was traced to him and that the statements of the child shortly after the events which indicated that he was engaged in a fight with the victims (J.A. 39-43); it does not indicate that the jury accredited the child's testimony as to *how* the deaths occurred, or that without the improper presumption they would have concluded that a malicious intent existed. Indeed, were it not for the testimony of two other witnesses concerning statements made by the little girl shortly after the event, it is entirely possible and even probable, that the jury would not have accepted any of her testimony. For, as the Trial Judge himself stated on the record, the child's testimony was so contradicted on cross-examination that the Judge concluded she had been impeached and it was only for this purpose that he allowed the admission of the statements made by the child to the other witnesses (J.A. 39).

accused specifically requested this instruction on the lesser included manslaughter offenses (J.A. 82, 83).

The State's own proof established that the male victim had a loaded gun with one spent cartridge, and it further established that there was an unaccounted for shell at the scene of the crime, and its own witnesses said that the child told them that "Charles and Clicker have guns . . . They are fighting. They have guns." (J.A. 39-43). Thus, those circumstances taken together without the instructed presumption would not be inconsistent or preclude a jury finding that the deaths could have resulted from defendant's own self-defense, anger caused by a sudden provocation brought on by the victims themselves, or mutual combat; and since no one could give an uncontradicted and accurate account of what occured, then the proof simply was not sufficient to prove that the perpetrator had not been provoked into the acts which caused the deaths. Furthermore, under Tennessee law circumstantial evidence is not sufficient to convict unless it excludes every other reasonable hypothesis except that of guilt. *State* v. *Thompson*, 519 S.W.2d 789, 792 (Tenn. 1975); *Webb* v. *State*, 140 Tenn. 205 (1918). And, under the Tennessee Constitution the jury has the right to determine both the law and the facts, a provision which the Tennessee Courts have held to mean that the Court cannot invade the province of the jury. *Dykes* v. *State*, 296 S.W.2d 861 (Tenn. 1956). Petitioner insists that it is inconceivable that a jury could acquit under such circumstances, yet other accuseds have been acquitted in many cases of much stronger evidence and indeed in an early Tennessee case this is clearly illustrated.[4]

Finally, the petitioner alleges that irrespective of all of the other considerations in this case, the evidence is so overwhelm-

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[4] In *Short* v. *State*, 15 Tenn. 510 (1835), a case tried upon a special verdict, the jury specifically found and reported in writing that without any legally justifiable provocation the accused, in response to being called a liar, struck and killed the victims, and the jury reported that "The blow was given upon a sudden quarrel, but there was no other provocation than abusive language . . ." Yet, the jury informed the Court that it was not convinced that malice had been established, and the Court then concluded that the accused was guilty of manslaughter and not murder.

ing and so dispositive of intent as to render the *Sandstrom* error harmless. In response to this contention, Respondent would simply point out that the State's assertions of the facts fail to take into consideration what was *not* proved as well as what was proved. That is, since the child witness was discredited and gave a different story on the stand than she gave to the witnesses after the events, there was thus no credible evidence of what took place and whether there was provocation, justification, self-defense or a fight is simply left to speculation. Likewise, the State ignores the fact that when the accused is said to have made threats toward the victim, he also stated that he loved her and could never do her harm (J.A. 66, 67). In essence, what the case all boils down to is the fact that the State's only eyewitness was contradicted and impeached and that nobody truly knows what happened or why it happened. They can guess and infer, but there is *no credible witness* who can say what actually happened. The accused clearly presented a mens rea defense, presented evidence of his mental incapacity and contested every issue. As stated in *Johnson*,

> "*The fact that the reviewing Court may view the evidence of intent as overwhelming is then simply irrelevant.* To allow a reviewing Court to perform the jury's function of evaluating the evidence of intent when the jury may never have performed that function would give too much weight to society's interest in punishing the guilty and too little weight to the method by which the decisions of guilt are made. . . . It is irrelevant in analyzing a mandatory presumption . . . that there is ample evidence in the record other than the presumption to support the conviction." *Connecticut* v. *Johnson*, supra. (Emphasis added).

D. The Harmless Error Doctrine Which Petitioner Would Have This Court Adopt Would Result In A denial Of Fundamental Rights Of Due Process.

At the outset it must be sincerely stated that the view expressed by the United States in the amicus brief of the Solicitor General is truly frightening, for it is apparent that the government's position is that the *administration* of the justice system is more important than the justice dispensed by that

system. While not attempting to delve into or respond to all of the arguments made by the government, which really have no relevance to the circumstances of this case, nevertheless respondent is compelled to point out that the government while *now* acknowledging that there are indeed some constitutional errors which could never be harmless, nevertheless opposed or failed to stand up for the enforcement of those same rights at the time when they were at issue in this Honorable Supreme Court.

Through the histories of the denial of such fundamental precepts of the law, it is clear that, it was only because of this Honorable Supreme Court's adherence to our constitutional protections that the State courts were and are compelled and indeed forced to grant the rights now acknowledged by the government including the assistance of counsel, freedom from a mob-dominated trial, right to trial by jury, representation of co-defendants with conflicting interests, the right to exculpatory information (i.e. Brady claims), ineffective assistance of counsel, and right to a speedy trial. (Brief of United States, pp. 10-12). Since the State and/or lower federal courts with the support of, or at least without the objection of, the United States actually denied those rights, then it is apparent what those same courts might do if given the opportunity to apply the harmless error doctrine to contested *Sandstrom* errors.

To appreciate the opportunity for abuse of the harmless error doctrine in this context, the Court need look no further than the history of this very case and the arguments made and espoused by the State of Tennessee in the lower courts. It has long been the law of the State of Tennessee that mere proof that a killing had occurred created a presumption that a murder had been committed and placed upon the accused the burden of offering mitigating circumstances sufficient to warrant an acquittal or reduce the offense to manslaughter; See *Coffee* v. *State*, 11 Tenn. 283, 291 (1832). The Tennessee Courts gave little concern to the fundamental principles enunciated in *Sandstrom* and indeed, even after the *Sandstrom* decision was handed down the State of Tennessee continued to deny that the

decision in *Sandstrom* meant what it said and the Tennessee Courts continued to affirm convictions based upon such unconstitutional burden-shifting instructions. Accordingly, when the present case came before the Tennessee Court of Criminal Appeals, it ruled against the defendant and affirmed the conviction stating that the instructions did not violate *Sandstrom* (A 37, 38). The Tennessee Supreme Court then refused even to grant certiorari or hear the appeal and continued to uphold convictions based upon those identical instructions (see *State* v. *Bolin*, 675 S.W.2d 40; 1984).

When the defendant then proceeded into the District Court on habeas corpus, the State again refused even to acknowledge that the instructions were erroneous and persisted in seeking to uphold those instructions. The State of Tennessee in support of its continued refusal to admit the error of this obviously erroneous instruction continued to rely upon decisions of the Tennessee Courts wherein these instructions were approved and even in its petition for certiorari in this Court the State alluded to them as being routine pattern jury instructions for use in criminal cases in the Tennessee Courts. (See Petition for Certiorari, pp. 4, 6).

It is clear, therefore, from the history of this case and the prior decisions of many State and Federal Courts, that such fundamental rights as the burden of proof and the presumption of innocence will be denied based upon erroneous arguments or rationale unless this Honorable Supreme Court firmly adheres to the principle that the rights to a fair trial contained in the due process clause must be enforced and cannot be denied by an unwarranted extension of the harmless error doctrine. This Honorable Supreme Court as the ultimate protector of the Constitution must not allow the lower courts to do exactly what the government in this very case is asking them to do, that is, look to the long history by which such rights have been denied as a justification for continuing their denial. Petitioner's arguments are in reality an attempt to erode the most basic and hallowed rights granted in the Constitution and the American system of justice.

E. The U.S. District Court And The Sixth Circuit Court Of Appeals Have Already Applied The Harmless Error Doctrine To The Facts Of This Case And There Is No Basis For Challenging Their Analysis.

The District Judge and the Sixth Circuit Court of Appeals applied the "traditional" harmless error analysis as enumerated by the Supreme Court in *Chapman* v. *California*, 386 U.S. 18 (1967) to the effect that "Under this analysis, error may be disregarded where the beneficiary of the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict" (A 4, 5). The Court of Appeals in finding for respondent agreed with the District Court's finding:

> "Accordingly, we agree with the trial court in this case that there was a *Sandstrom* violation inherent in the instructions given by the Tennessee trial court, and that in this murder case involving a defense of lack of *mens rea*, the error was not harmless beyond a reasonable doubt, despite the substantial evidence of petitioner's guilt presented to the jury." (Pet., A-6).

As the District Judge stated in his thorough evaluation of the effect of the error:

> "In this Circuit,
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> *** the prejudicial effect of a *Sandstrom* instruction is largely a function of the defense asserted at trial. If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of mens rea, a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial. ***" (Emphasis added). (Pet., A-15, 16).

After applying that rule, the Court thoroughly analyzed the record,[5] and concluded,

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[5] The Judge extensively analyzed the record and noted that the defendant (1) raised the issue of *mens rea* in his opening statement at the outset of the trial, (2) brought out evidence on cross-examination of the State's witness showing that the defendant had engaged in strange behavior, was experiencing mental problems and was upset physically and depressed emotionally, (3) noted that the Trial Judge himself recognized after the State had rested its

> "Clearly, this is not a situation where the defendant acknowledged at trial that an intentional, malicious killing had occurred and only claimed non-participation therein. Instead, Mr. Clark's defense accented both the physical and mental elements of the offenses charged. His defense was threefold: (1) that he did not commit the killings and knew nothing about them; (2) that, because of mental-illness and voluntary intoxication, he was not guilty; and (3) that, even if the jury should find the existence of all elements of the crimes, he should be found not guilty by reason of insanity.
>
> From the outset of the trial, it was clear that the defense was unlikely to concede anything, rather that it intended to put the State to its burden of proving beyond a reasonable doubt every element of the offenses charged, physical as well as mental. The reliance on a mens rea defense, in addition to the claim of non-participation, was evident throughout the entire trial." (Emphasis added). (Pet., A-16, 17).

In view of the District Judge's diligent analysis of the harmless error doctrine and his extensive review and application of the facts of this case to that doctrine, and the concurrence of the Sixth Circuit in the conclusion that the error was not harmless, there simply is no basis for petitioner's harmless error argument.

Defendant contested not only the issues of insanity but indeed the issues regarding how and why the crime was committed and specifically suggested that if, in fact, the accused

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case in chief, that "the principal issue here as the Court discerns it after three and one half days of trial, is who killed these people, or if the defendant did what was his state of mind," (4) noted that defense counsel requested that the Judge charge the jury concerning defendant's ability to formulate specific intent to kill or to harbor malice, (5) that defense counsel requested that a jury instruction be given concerning the effect of drunkness on defendant's *mens rea*, (6) noted that the defense called two psychiatrists who testified that defendant's mental illness was such that it rendered him substantially incapable of conforming his behavior to the requirements of law, (7) called a psychiatrist who acknowledged that the defendant had informed him that he had consumed six six-packs of beer plus a quantity of vodka on the date the killings occured, (8) that each of these doctors supported petitioner's claim that if, in fact, he committed the offense he had no recollection of the offense of that day due to amnesia. (Pet., A-17, 18, 19).

did shoot the victims it was as a result of a fight. He brought out to the jury that the child witness to the events had stated "They have guns; and they are fighting," (Tr. 306, 315, 316, 998, 1051; J.A. 172-176) and that a fifth shell was found at the scene by the police which would indicate that another shot was fired by someone other than the defendant (Tr. 1051) and one of the victims was found to have a pistol in his pocket (Tr. 155). Defendant's counsel in his closing argument to the jury asserted that the defendant was not required to prove he was innocent and due to his amnesia could not tell what happened even if he had been at the scene and that "I submit to you if you have a reasonable doubt about *any aspect of this case* that is material and that the prosecution has to prove, then it is your duty to find the defendant not guilty." (Tr. 1049, 1050; J.A. 175).

Furthermore, the *State actually sought to shift the burden to the defendant*. The District Attorney took full advantage of the improper burden-shifting presumption by stating in his closing rebuttal argument, that the Court would instruct the jury that all killings are presumed to be malicious unless rebutted (J.A. 170) and,

> "You are justified in finding willful, deliberate, malicious and premeditated murder. *There has been no proof whatsoever to the contrary*, that this was not a first degree murder" (Tr. 1071; J.A. 181).

The Federal Courts below have correctly ruled on this issue.

II.

RESPONDENT WAS PREJUDICED BY THE INSTRUCTIONS ON PRESUMED MALICE GIVEN IN THIS CASE.

A. Respondent Did Not Admit That A Malicious Killing Had Occurred.

Contrary to the assertions of Petiioner, and as pointed out above, Respondent not only contested the elements of the offense but asserted that no one knew what happened; introduced or relied upon evidence of a fight and of his mental state specifically to rebut the inference of malice, premeditation and intent; offered three proposed jury instructions for the specific purpose of contesting the evidence as to this mental state on

the issue of malice, (Tr. 1104; R. 110, 111, 112, 116) and specifically requested the Court to charge the jury as to both of the lesser offenses of voluntary and involuntary manslaughter, neither of which involve malicious intent (J.A. 774). This position in no way, shape or form conceded that the killings if committed by the defendant were done with malice, intent or premeditation.

B. There Is No Logical Basis For Petitioner's Assertion That A Malicious Crime Had To Be Committed Simply Because The Accused Says He Does Not Know What Happened.

Petitioner says that the mere raising of an insanity defense means that the accused acknowledges that the crime was committed in the manner charged. This simply does not make sense. Defendant merely said that if, in fact, he did commit the acts charged, he was mentally ill and did not have the mental capacity to be held accountable. That contention surely does not concede that if he killed the victims he did so with malicious intent. Indeed, the only basis for this proposition cited by the State is its contention that, under the holding of the Tennessee Supreme Court in *Graham* v. *State*, 547 S.W.2d 531, at p. 543 (Tenn. 1977) the very nature of an insanity defense acknowledges the elements of the offense charged and simply disavows criminal culpability. However, that case says nothing of the sort, and on the page listed in the State's brief, there is absolutely no language which would permit that interpretation. Furthermore, it would be unconstitutional and an obvious denial of due process to say that a person who is insane has to admit that he had criminal intent before he can show his insanity. That contention simply is without foundation.

Petitioner further asserts that in *Connecticut* v. *Johnson*, supra, a four-justice plurality held that where the defense relies upon alibi, insanity or self-defense to establish innocence or non-culpability, that the reviewing Court is permitted to conclude that the error was harmless beyond a reasonable doubt. In fact, the Court in *Johnson* said only that where those types of defenses are raised "a defendant *may in some cases admit* the act alleged by the prosecution was intentional,

thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the Appellate Court to consider the error harmless." 103 S.Ct. at 978 (Emphasis added). In the present case the accused never admitted or conceded anything and thus, this Court cannot apply the harmless error analysis and even if it did so, it could not concluded that the issue in this case was harmless beyond a reasonable doubt without simply destroying the rights of an accused to defend solely and alone upon the presumption of innocence and attacks upon the credibility of the prosecution's evidence.

Without having the means to present direct evidence because of his amnesia and in reliance upon his right to not to testify, there is little more he could have done to controvert the issue of intent, and surely petitioner is not contending that the defendant had a duty to testify and could not rely upon the presumption of innocence to overcome the State's proof.

Furthermore, even if all of the State's proof were conclusive as to the events prior to the day of the alleged killings, that would not establish conclusively that the killings occurred in the *manner* contended by the State. It would support a finding by the jury, but it would not *compel* such a finding.

However, after being told that the accused is presumed to have a malicious intent which the Court defined as ". . . an intent to do injury to another, a *design* formed in the mind . . . where a person *actually contemplates* the injury or wrong he inflicts . . . that *condition of the mind* which indicates a wicked, depraved and malignant spirit . . ." (J.A. 186-187), it is obvious that a reasonable juror could have believed that the jury was required by law to find the existence of the malicious intent, including the *design* formed in the mind *which actually contemplated the injury and wrong he inflicted* and that defendant possessed a wicked, depraved and malignant spirit. A reasonable juror could likewise have believed that the presumption required a finding of even the elements of willfulness and deliberation. The Court itself did not attempt to distinguish in its instructions between the various types of intent, and it is clear that a reasonable juror as a layman could very

likely conclude that the presumed intent was the same as the intent embodied in willfulness and deliberation.

It is just as obvious that the jury, having been instructed to find the existence of such intent based upon the fact of the killing alone, then could have reasonably concluded that such an intentional contemplative act was inconsistent with defendant's contention that due to mental illness he was unable to conform his conduct to the requirements of the law. If he was presumed capable of contemplating, designing and intending the actual wrong inflicted then this would mean that his mind was free to act rationally and that his acts were voluntary, which would not be consistent with his defense that he was incapable of conforming his conduct to the requirements of the law.

Petitioner alleges that because the Court instructed the jury that they must determine whether the defendant was guilty or not guilty prior to determining whether or not he was insane, that this establishes that the jury evaluated the respondent's claim of insanity without regard to the manner in which malice was defined. This, too, is a non sequitur, for just the opposite is true. Since the jury was instructed that it must first find the accused guilty of the offense and was told that the guilty malicious intent was presumed, the jury could reasonably have found the malicious intent based upon the presumption of malice rather than an actual finding of malice. The instructions given by the Court nowhere tell the jury that it is not to consider these presumptions when considering the insanity defense, thus, having already concluded that it was required to presume the malicious intent for one purpose, the jury could assume that it must presume such intent on the issue of insanity as well, thereby completely negating his insanity defense.

Accordingly, the presumption clearly denied defendant a fair consideration of the evidence on either of his defenses that (1) the State had not established how the killings occurred and had not established that they were wilfull, deliberate, premeditated or malicious, and (2) that the accused could not be found guilty because of his insanity.

C. Under Tennessee Rules Of Criminal Procedure Respondent Was Not Required To Object To Erroneous Jury Instructions And His Failure To Do So Did Not Indicate Approval Of Those Instructions.

Finally, the Solicitor General contends that because the accused did not object to the instructions on malice at the trial that this supports the conclusion that the instructions were not perceived as likely to prejudice his defense. Again, this simply is not so. Under the Tennessee Rules of Criminal Procedure, #30-B, dealing with objections to jury instructions, *defendant is not required to object to jury instructions*, and as the rule expressly states: ". . . failure to make objection shall not prejudice the right of a party to assign the basis of the objection as error in support of a motion for new trial on appeal."

Furthermore, the reason for the failure to object is obvious. As the District Judge pointed out, the law in Tennessee for generations has been in accordance with the jury instruction given by the Trial Court, and it has been affirmed time and again that such instructions are a correct statement of the Tennessee law, which presumes that all killings are murder and once a killing is shown, it places upon the accused the burden of reducing the offense to manslaughter or establishing a complete defense on some other grounds (A 12). Thus, to have objected would have been futile and would have served no purpose since the Court would merely have held, as did the Court of Criminal Appeals, that the instructions correctly stated the Tennessee law.

III.

THE FEDERAL COURTS BELOW CORRECTLY EVALUATED THE ERRORS BASED UPON TENNESSEE LAW.

A. The Trial Court Properly Applied Existing Tennessee Law.

Although the briefs of Petitioner and the amicus briefs filed on its behalf nowhere even address or attempt to define what malice is under Tennessee law, for some reason not apparent, Petitioner contends that the District Judge did not inquire concerning whether and how the jury was instructed on the

aspects of his defense involving intoxication, amnesia and mental illness. In fact, the Judge discussed each of these matters in light of the Tennessee law on malice (A-17-20).

It is likewise difficult to understand how petitioner could say that the Judge did not understand Tennessee law. The District Judge was a Tennessee lawyer of long experience on the Federal Bench in Tennessee, and he clearly knew and appreciated the Tennessee law and properly applied it to his determination in this case. He pointed out in depth that the real problem is the fact that Tennessee had long adhered to the doctrine that *all homicides are presumed to be malicious, so that if the killing be proved, the law presumes that it was malicious and it was incumbent upon the defendant to show by proof, matters in alleviation or that it was a less offense* (A 12), and he quoted from the Tennessee case of *Coffee* v. *State*, 11 Tenn. 283 (1832) concerning the Tennessee doctrine that, "If A killed B, and that fact alone being established by the State, the malice is presumed, and the onus of exculpation is upon the defendant." Citing Tennessee cases (A 12).

The District Judge likewise pointed out that the law of Tennessee presumes malice from the use of a deadly weapon and stated:

> "These presumptions of malice appear to be an outgrowth of *the now unconstitutional presumption that every person* intends the usual and natural consequences of his or her acts. The Tennessee Supreme Court in *Draper* v. *State*, 63 Tenn. 246 (1875) specifically approved the jury instruction that 'Every man is presumed to be innocent, until his guilt is legally made to appear; but when a homicide is clearly proven, and the slayer ascertained, and nothing more appears, the killing is presumed to be criminal, as every person is presumed to intend the usual and natural consequences of his acts.'" (A 12, 13). (Emphasis added).

The Judge clearly analyzed, appreciated and understood the Tennessee law and just as clearly he recognized that the instructions in this case violated the accused's rights to a fair trial under the *Sandstrom* principles.

B. The District Court Correctly Found That The Mental State Of The Accused Was Relevant To The Issue Of Intent Under Tennessee Law.

The governing principles in this case under established Tennessee law require that the jury in determining malice, intent and premeditation must look to the state of mind of the accused to be determined from all of the circumstances in the case, and it is for the jury alone to determine the weight and effect of the evidence.[6]

In *State* v. *Bullington*, 532 S.W.2d 556 (Tenn. Sup. Ct.; 1976) it was held that in order to constitute murder in the first degree, the cool purpose to take the life of the persons slain must be formed and the deliberate intention conceived in the mind of the accused, in the absence of passion, and that,

> "If the purpose to kill is first formed during the heat of passion, the accused, to be guilty of first degree murder must have committed the act *after the passion has subsided. Passion*, as here used, *means any of the human emotions known as anger, rage, sudden resentment or terror which renders the mind incapable of cool reflection.*" (Emphasis added).

The Court in *Bullington* then went on to state:

> "The *mental state* of the assailant . . . rather than the length of time . . . is the material point . . . the mental process . . . may have been instantaneous, and the question of vital importance is—was the mind, at the moment, so far free of the influence of excitement, or passion as to be capable of reflecting and acting with a sufficient degree of coolness and deliberation of purpose; and was the death of the person assaulted, the object sought to be accomplished—the end determined upon."

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[6] In *Gordon* v. *State*, 478 S.W.2d 911, 916 (Tenn. Ct. Cr. App.), in dealing with the malice issue, the Court stated:

> "Of course it is fundamental that the jurors are the sole and only judges of the evidence and the weight to be given to the swearing of each and every witness in the case. *Credibility* of the witnesses and the weight and value of their testimony, the *inferences* to be drawn from their statements, and all factual issues raised by the testimony in evidence introduced—direct and circumstantial, are matters entrusted exclusively to the jury as the triers of the facts."

In *Bullington* it was likewise stated that "*the nature of the fact to be proven*, i.e., the *mental state of the accused*, is such that ordinarily only *circumstantial evidence* is available. The circumstances of the killing itself may afford the needed proof." The Court there, however, went on to note that evidence of intoxication and the extent of its effect upon the mental state of the accused was relevant since *even voluntary drunkness* of the accused could render him incapable of forming a premeditated and deliberate design to kill.

Finally, in the recent case of *State* v. *Adkins*, 653 S.W.2d 708 (Tenn. Sup. Ct.; 1983), the Court there dealt with a case where there was evidence that the accused had been drinking all day long before he committed the homicide in that case and the Court noted the significance of this evidence not only as to the element of premeditation but also that it must be considered on the element of intent, stating,

> "Even when an intoxicated defendant is capable of forming specific intent, his drunkness may be considered in determining *whether he specifically intended the particular act for which he is on trial.*" (Emphasis added).

Thus, under Tennessee law the accused's mental state or condition is the specific and critical issue to be determined in deciding whether the accused possessed the intent to do the particular act charged and thus would relate to premeditation, deliberation and willfulness as well as the intent required for malice, i.e. a design "where a person actually contemplates the wrong he commits." (J.A. 186, 187). Accordingly, *any factor which would effect his mental state or condition* was proper and indeed critical for the jury's consideration.

In the present case for the State to prove the defendant guilty of first degree murder under the instructions given by the Court it must establish that the killing was *intentional*, premeditated and malicious (J.A. 184-186). *Premeditation* was defined by the Trial Court as "*The intent* to kill must have been formed prior to the act itself" (J.A. 185) whereas *malice*, as noted supra, was defined by the Trial Court as "That the defendant was of the *state of mind* to do the alleged wrongful act without legal justification or excuse" (J.A. 184, 185) and an

intent to do injury, *a design formed in the mind* where a person *actually contemplates the injury or wrong he inflicts* (J.A. 186). The Court properly charged the jury that *voluntary drunkness* of one charged with taking the life of another *can be looked to* for the purpose of determining whether such drunkness had so *affected the mind* of the person charged that, at the time he was incapable of forming in his mind a *premeditated and deliberated design to kill*" (J.A. 194).

Intent is likewise an element of malice and while intoxication does not negate malicious intent as a matter of law, it is a fact and circumstnce of the case that the jury is entitled to consider as a part of the defense evidence that negates express malice and would cast doubt upon any inference of implied malice. Having established malicious intent as an element of the offense, the State could not prevent the defendant from offering evidence to counter the existence of the very mental state which makes up that element. Yet, by its instructions, that is precisely what the Court did.

C. The District Judge Did Not Misapply The Law Regarding Amnesia.

The State contends that the Court misinterpreted Tennessee law concerning Respondent's claim of amnesia and that amnesia is not a defense to the crime under Tennessee law. This assertion simply overlooks or disregards what the Court found and stated. Nowhere did the Sixth Circuit Opinion ever mention the word "amnesia" much less state that it was a "defense." Likewise, the District Judge nowhere stated that amnesia was a defense, but rather he simply pointed out that defendant's claim of amnesia was supported by the doctor's testimony and that it was relevant insofar as it reflected upon his state of mind. (Pet. A-19, 20).

D. The Tennessee Courts Have Long Recognized The Right Of The Jury To Consider Mental Illness Not Amounting To Fixed Insanity On The Issue Of Malice In Determining Whether A Homicide Is Murder Or Only Manslaughter.

The petitioner contends that the mental state of the accused is irrelevant since Tennessee does not recognize the defense of

diminished capacity. It may be true that Tennessee has never specifically adopted the doctrine of diminished capacity as that term is used in some jurisdictions and that evidence of intoxication and mental illness not amounting to fixed insanity are not sufficient *as a matter of law* to reduce murder to homicide or negate malicious intent; yet, it is not true that under traditional Tennessee law the mental state or mental illness of the accused is irrelevant to the considerations of whether or not the accused is guilty of murder or the lesser offense of manslaughter.

The only cases cited by the State in support of its position are the cases of *State* v. *Taylor*, 645 S.W.2d 759 and *State* v. *Croscup*, 604 S.W.2d 69. Neither of those cases were decided by the Tennessee Supreme Court and though they do say that Tennessee does not recognize the defense of diminished capacity they were decided upon jury instructions which were not set forth in the Opinion and which the courts said were not accurate statements of the law and that there was no error in rejecting them. Even if the Tennessee Supreme Court would even now agree that the defense of "diminished capacity" as such, does not exist in this State that does not in any way affect the right of the jury to consider all of the evidence, including intoxication, amnesia and mental illness in its determination of whether the accused harbored the necessary malice to constitute the crime of murder. In *Dry* v. *State*, 184 S.W.2d 10 (1944), the Tennessee Supreme Court actually reversed a conviction for murder in the first degree and granted a new trial based upon proof of the mental condition of the accused which, though not sufficient to constitute an absolute defense of insanity, nevertheless was deemed sufficient to affect his mind causing him to lose control due to passion from continued outrage and suppressed anger. That Court specifically noted that if the excitement and passion adequately aroused obscures the reason of the defendant, the killing will be reduced to manslaughter and held,

> "That his actions in procuring the weapon and seeking contact with his wife appeared deliberate and determined, is *not persuasive that his passion had cooled. Suppressed anger is a common accompanyment of passion, the deepest and most powerful emotion, and of determination*

> *beyond control to carry through a design formed in passion.* Nor is the fact that he was relatively calm after the event inconsistent. Having discharged the weapon, his mind recoiled into calm, quite naturally over the strain, he rolled a cigarette but then his outraged love surged again wishing that his hand had been stayed by the intervening peace warrant and he broke down and cried." *Dry* v. *State*, supra.

Likewise, in *Kohler* v. *State*, 152 Tenn. 1 (Tenn. Sup. Ct. 1923) even though the defendant's mental illness was not sufficient to constitute an absolute defense, nevertheless upon a review of the evidence the Court reduced a conviction for murder to manslaughter, because it found that the defendant was under great mental stress,[7] holding,

> "It is not necessary to reduce a killing to manslaughter that passion should be so great as to render the defendant incapable of deliberation or premeditation. If the circumstances be such as are calculated to produce such excitement and passion as would obscure the reason or an ordinary man and induce him, under such excitement and passion, to strike the blow that causes the death of the deceased, this will reduce the killing to manslaughter." *Kohler* v. *State*, supra.

And in the case of *Davis* v. *State*, 161 Tenn. 23 (1930) the Tennessee Supreme Court noted that under the M'Naughten test of an insanity defense under the law as it existed in Tennessee at that time, in order to excuse a party for the commission of a crime, insanity must be of such a character as to deprive the person of his reason so far as to render him incapable of distinguishing between right or wrong or discerning good from evil. The Court nevertheless ruled that if the accused was acting under an insane delusion under the influ-

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[7] In reaching this conclusion, the Court in *Kohler* specifically quoted from the Mississippi case of *Haley* v. *State*, 123 Miss. 87, 85 So. 129, to wit:

> "A husband was being tried for the murder of his wife's paramour, and the evidence for the defendant showed that the accused was so aroused by the wife's confession of adultery that he neither ate nor slept, was in a constant state of agitation for two days. When under great feelings he shot the deceased to protect his vows. It was held that this offense was not greater than voluntary manslaughter." *Kohler* v. *State*, supra.

ence of passion and agitation, he would only be guilty of manslaughter.[8]

The Court in *Davis* further noted that the mental condition would be material on the issue of "cooling time" such that where a normal person would be expected to cool off from a provocation or upset,

> "Possessed by this insane delusion, *deranged* on the subject, he remained deaf to the voice of reason and to the voice of conscience. He was beyond reason and conscience in this particular as the record clearlly shows." *Davis* v. *State*, supra.

It is clear then that the Tennessee Courts have traditionally considered the mental state or illness of the accused on the issue of malice, and the jury was certainly entitled to consider this condition in deciding whether or not the accused in the present case actually harbored the malice necessary to convict of either first or second degree murder.

E. Prior Decisions Of The Tennessee Courts Based Upon Presumed Malice And Intent Are Unconstitutional And Thus Are No Longer Controlling.

(1)

While it is true as Petitioner asserts that the Tennessee Courts have in the past adhered to the doctrine that intoxication would not be a defense to murder in the second degree and would not reduce a homicide below murder in the second

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[8] The Court set aside a conviction of murder and granted a new trial stating,

> "It is not necessary that a defendant's reason be dethrowned to mitigate a killing to manslaughter. It is error to so instruct the jury. *Young* v. *State*, 30 Tenn. (11 Hump) 200; *Haile* v. *State*, 31 Tenn. (1 Swan) 248. If the excitement and passion adequately aroused obscures the reason of the defendant, the killing will be reduced to manslaughter. *Seals* v. *State*, 62 Tenn. (3 Baxt.), 459; *Toler* v. *State*, supra. *A defendant acting under such temporary mental stress is presumed to be incapable of malice an essential element of murder.* How then can malice be imputed to a defendant when his reason is not merely obscured but has been swept away and kept away by an insane delusion under which he acts. How can such defendant be guilty of murder while his delusion persists." *Davis* v. *State*, supra. (Emphasis added).

degree, it is immportant that the reason for this rule be analyzed.

The Tennessee Supreme Court in *State* v. *Bullington*, supra, which was decided in 1976 and has been often cited since that time, set forth and repeated the rules regarding evidence of intoxication, and specifically cited as the basis for that decision the case of *Hale* v. *State*, 30 Tenn. 154 (1850); likewise, in a subsequent Tennessee case concerning that issue the Tennessee Court of Criminal Appeals in *Burns* v. *State*, 591 S.W.2d 780 (1979) cited the Tennessee Supreme Court case of *Atkins* v. *State*, 119 Tenn. 458 (1907) as its authority. From those cases it is clear that those long held Tennessee doctrines relied upon by Petitioner have been directly overturned by the decisions of the United States Supreme Court which held that the presumptions underlying those decisions are unconstitutional.

The Court in *Atkins* v. *State*, supra, simply reiterated the prior holding in *Hale* v. *State*, supra, where the Court stated as follows:

> ". . . The principle layed down by the court is, that when the question is can drunkness be taken into consideration in determining whether a party be guilty of murder in the second degree, the answer must be, that it cannot; *but when the question is, what was the actual mental state of the perpetrator at the time the act was done*, was it one of deliberation and premeditation, *then it is competent to show any degree of intoxication* that may exist, *in order that the jury may judge, in view of such intoxication, in connection with all other facts* and circumstances, whether the act was premeditatedly and deliberately done.
>
> *The law often implies malice from the manner in which the killing was done*, or the weapon with which the blow was stricken. In such case, it is murder, though the perpetrator was drunk. And no degree of drunkness will excuse in such case unless by means of drunkness an habitual or fixed madness be caused. *The law in such cases, does not seek to ascertain the actual state of the perpetrator's mind, for the fact from which malice is implied having been proved, the law presumes its exis-*

> *tence, and proof in opposition to this presumption, is irrelevant and inadmissible. Hence, a party cannot show that he was so drunk as not to be capable of entertaining a malicious feeling. The conclusion of law is against him.*
>
> But when the question is, whether a party is guilty of murder in the first degree, *it becomes indispensible that the jury should form an opinion as to the actual state of mind with which this act was done.* All murder in the first degree (except that committed by poison and by lying in wait), must be perpetrated willfully, deliberately, maliciously and premeditatedly. *The jury must ascertain as a matter of fact that the accused was in this state of mind, when the act was done.* Now according to cases of *Swan* v. *The State*, and *Pirtle* v. *the State*, *any fact that will shed light upon this subject may be looked to by them, and may constitute legitimate proof for their considerations.* And among other facts any state of *drunkness* being proved as a legitimate subject of inquiry, as to what influence such intoxication might have had upon the mind of the offender and the perpetration of the deed.
>
> We know that an intoxicated man will often upon a slight provocation, have his passions excited and rashly perpetrate a criminal act.
>
> Now, it is unphilosophical for us to assume, that such a man would in the given case be chargeable with the same degree of deliberation and premeditation, that we would ascribe to a sober man perpetrating the same act upon a like provication. *Hale*, supra at p. 157; *Atkins*, supra at p. 418. (Emphasis added).

In further discussing the same subject of intoxication, the Tennessee Supreme Court in *Lewis* v. *State*, 304 S.W.2d 322, decided in 1957, went on to further state that the basis for the presumption of malice in a murder case is,

> "Every man is presumed to be innocent until his guilit is legally made to appear; but when a homicide is clearly proven, and the slayer ascertained, and nothing else appears, the killing is presumed to be criminal, as *every person is presumed to intent the usual and natural consequences of his acts.*" (Emphasis added).

Thus, under established Tennessee law evidence of the state of mind as to intent, where intent is at issue, is admissible before

the jury and "any fact that will shed light upon this subject may be looked to by them and may constitute legitimate proof for their consideration." However, under the pre-*Sandstrom* Tennessee law the *intent* which is the very essence of malice *was not at issue* where the killing was proved or a deadly weapon was used *because the law then presumed the malicious intent* from those facts alone. The accused was not allowed to controvert this presumption except to show that he acted in self-defense or that there was provocation which brought about his acts, because it was held "every person is presumed to intend the usual and natural consequences of his act." Since the Supreme Court's decisions in *Mullaney*, *Sandstrom* and *Patterson* and *Francis*, such presumptions are clearly unconstitutional and malicious intent can no longer be presumed but must actually be proved where it is a necessary element of the crime charged. Accordingly, since the basis for the rule that excluded intoxication or other evidence of the state of the accused's mind no longer exists, and since intent is the essence of malice, the accused now would have the right to show under Tennessee law itself, "*any fact*" or evidence that would have a bearing upon his "state of mind" or "actual mental state" as it relates to the malicious intent. Likewise, the Tennessee Courts can no longer presume that the accused intended the usual and natural consequences of his acts to establish implied malice, but actual intent must also be established by the evidence since such intent is a necessary element of the crime of murder. Again, such intent would allow proof of any facts which would shed light upon the subject.

The Tennessee Supreme Court has now apparently recognized this circumstance, since its Opinion in *State* v. *Martin*, supra, now clearly holds that in Tennessee malice is an essential element of both murder in the first degree and murder in the second degree, that it is an element different from premeditation and must be actually proven, since "No element of a criminal offense is to be presumed," and that the issue of malice requires the jury "to draw inferences and to decided questions of credibility."

Thus, evidence of defendant's mental illness, amnesia and consumption of vast quantities of alcohol were proper subjects

or circumstances for consideration by the jury on the issue of defendant's mental state or mens rea. In fact, the State itself raised the issue of the accused's intoxication during the testimony of Sylvia Barrett (J.A. 63, 69), and during cross-examination of the defense's psychiatrist it brought out substantive evidence of intoxication by way of an admission by the defendant in an apparent attempt to prove that defendant's amnesia was a result of intoxication rather than insanity (J.A. 97-98). The State can hardly complain about the relevance of evidence the State itself introduced into the record, and clearly such evidence is relevant and material.

(2)

Under the law of Tennessee as it was held at the time of Respondent's trial, mere proof by the State that a killing had occurred raised a presumption of malice and without more the law presumed that the killings were murder in the second degree. The State than had the burden of showing the circumstances sufficient to raise the offense to first degree murder, while on the other hand the burden was placed upon the accused to establish circumstances of provocation or mitigation sufficient to rebut the implied malice and reduce the offense to manslaughter. See *Everett* v. *State*, 528 S.W.2d 25 (Tenn. Sup. Ct. 1975); *Sikes* v. *State*, 524 S.W.2d 483 (Tenn. 1975); *Lewis* v. *State*, 304 S.W.2d 322 (Tenn. Sup. Ct. 1957); and *Coffee* v. *State*, 11 Tenn. 283, 291 (183). Proof sufficient to rebut the presumed malice and reduce the offense to manslaughter includes evidence that the killing resulted from the heat of passion caused by adequate provocation. *Cooper* v. *State*, 210 Tenn. 63, 356 S.W.2d 405 (Tenn. Sup. Ct. 1961). In this context passion is defined as synonymous with anger and includes any of the emotions of the mind known as *anger, rage, sudden resentment, or terror. Winton* v. *State*, 151 Tenn. 177 (1924). Likewise, "Homicide resulting from *mutual combat* or the excitement and heat of passion arising therefrom is voluntary manslaughter." *Wright* v. *State*, 497 S.W.2d 588 (Tenn. 1973); *Bryant* v. *State*, 503 S.W.2d 955, 958 (Tenn. 1973). Furthermore, "To rebut this presumption, the defendant need only prove that he was greatly provoked . . . it seems to be a pure

question of fact for the consideration of the jury who are to decide whether the act was intentional, and if so, by what motive the agent was really actuated." *Coffee* v. *State*, 11 Tenn. 283 (1832).

The instructions given by the Trial Judge in the present case were in accordance with the above-stated doctrines of long established Tennessee law, so that once the killing was established, it was incumbent upon the respondent to bear the burden of satisfying the jury that the malice was rebutted and that the deaths had resulted from mutual combat or passion, anger or rage resulting from adequate provocation. This clearly was unconstitutional under the Supreme Court's holdings in *Mullaney*, *Patterson*, *Sandstrom* and *Francis*, supra. As specifically held in *Mullaney* and *Patterson*, the attempt by a State to place the burden upon the accused to disprove an element of the crime is unconstitutional and a denial of due process. It is thus obvious that the jury instructions in the present case violated Respondent's rights by requiring him to produce evidence which would reduce the offense from murder to manslaughter. Much of the evidence suggests that the deaths may have come about as a result of "mutual combat," passion, anger, rage or sudden resentment. Without the erroneous presumption placing the burden on the accused, the jury might well have concluded that there was sufficient indication that something other than a malicious killing had occurred. The jury well could have found that the State had failed to meet its burden of proving the actual circumstances surrounding the deaths and the accused's actual state of mind, and accordingly, could have found defendant guilty of the lesser offense of manslaughter—if they found him guilty of anything at all.

F. The Petitioner's Attempt To Prohibit The Consideration Of Evidence Bearing Upon Respondent's Actual Mental State Would Be A Denial Of The Due Process Right To Present A Defense.

Finally, it is clear that the State's arguments concerning consideration of intoxication, mental illness and amnesia could not be justified constitutionally. First of all, regardless of any other considerations the evidence was, in fact, presented to the

jury and was properly admitted. Indeed, as previously noted, the State itself introduced evidence of Respondent's drinking in an apparent attempt to rebut his insanity defense by inferring that his amnesia and alleged malicious intent were produced by intoxication rather than any mental illness (J.A. 63, 64, 69, 97, 98). Thus, the State could hardly object to evidence which it introduced and sought to utilize to its own advantage.

Furthermore, since the very charge of malicious killing requires a finding as to Respondent's intent and state of mind, the State could not constitutionally refuse to allow the jury to consider evidence which was properly admitted and clearly relevant to the issues of his actual state of mind; to do so would violate the fundamental principles of due process under the 14th Amendment by denying the Respondent the right to present evidence in his own defense in order to establish his own version of the facts as they relate to his mental state and intent. This is even more significant due to the fact that the State by the improper jury instructions placed the burden upon the Respondent to rebut the implied malice and criminal intent. Having required the accused to bear this unconstitutional burden, the State would now go even further and have this Court hold that the jury would not have been authorized to even consider the properly admitted evidence which would rebut the improper presumption. This simply cannot be justified.

As the Supreme Court in *Faretta* v. *California*, 422 U.S. 806, 818, plainly held, the 14th Amendment due process guarantees includes the accused's Sixth Amendment right to obtain witnesses in his favor, and as the Court there phrased it "In short, the amendment constitutionalizes the right in an adversay criminal trial to make a defense as we know it." the Supreme Court has emphasized the importance of this fundamental right by holding that even legitimate State evidentiary rules must bow to the requirement that an accused be permitted to establish the elements of his defense. In *Chambers* v. *Mississippi*, 410 U.S. 284, 35 L.Ed.2d 297, 308, this Court said that "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against

the State's accusations." Thus, it ruled that reliable hearsay could not be mechanistically excluded where it was vital to the accused's defense. Likewise, in *Green* v. *Georgia*, 42 U.S. 95, 97 the Supreme Court ruled that "regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case exclusion constituted a violation of the due process clause of the 14th Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial." In *Washington* v. *Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, (1967) the Court summed up the issue as follows:

> "The right to offer the testimony of witnesses and to compel their attendance if necessary is in plain terms *the right to present the defendant's version of the facts as well as the prosecution's to the jury* so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witness for the purpose of challenging their testimony, *he has the right to present his own witnesses to establish a defense*. This right is a fundamental element of due process." (Underscoring added).

The First Circuit Court of Appeals in *Pettijohn* v. *Hall*, 599 F.2d 476 (1979) had occasion to analyze the doctrine further and review the various Supreme Court decisions as a result of which it set forth conclusions which are highly relevant and pertinent to the present case, to-wit:

> "In the context of a criminal trial, the sixth amendment severely restricts a trial judge's discretion to reject such relevant evidence. Exclusion of relevant exculpatory evidence infringes upon the *fundamental right* of an accused to *present witnesses in his own defense*. The right of compulsoty process in state courts is well established. . .
>
> . . . *Washington* v. *Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). This right *gains special importance when the evidence is critical to the accused's defense*. *Chambers* v. *Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).
>
> Once a sixth amendment right is implicated, the state must offer a sufficiently compelling purpose to justify the practice. Various state evidentiary rules which advanced legitimate state interests have bowed to the defendant's

> right to let the jury hear relevant evidence. See, e.g., *Washington* v. *Texas*, supra (state interest in avoiding perjured testimony did not justify its rule barring co-conspirators from testifying); *Chambers* v. *Mississippi*, supra (state law excluding third party hearsay confessions did not justify exclusion). Cf. *Davis* v. *Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (confrontation right prevails over juvenile proceedings privilege statute); *United States* v. *Nixon*, 418 U.S. 683, 709, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (executive privilege yields to need for criminal evidence). The reasons offered for exclusion in this case are likewise insufficient. *Pettijohn* at 480. (Emphasis added).

Under the circumstances of this case and after the evidence was in fact admitted, the Petitioner cannot now justly say that the accused was not entitled to have that evidence considered by the jury or the appellate courts on the very issue that was the subject of the unconstitutional jury instruction. The State was allowed to benefit from the unconstitutional presumption of malice and criminal intent and the accused was required to produce evidence in rebuttal. To uphold the State's position would be to simply disregard any precept of fundamental fairness or due process and would be in effect saying that the accused did not have a right even to present a defense to the charges against him.

IV.

THE AUTHORITIES RELIED UPON BY PETITIONER ARE NOT APPLICABLE TO THE FACTS OF THIS CASE AND HAVE BEEN DIRECTLY REFUTED BY THE TENNESSEE SUPREME COURT.

As a further basis for its contention that the error in this case is harmless, petitioner relies upon this Court's prior decision in *U.S.* v. *Frady*, 56 U.S. 170 (1982). However, it is clear that *Frady* is irrelevant to the inquiry here since in *Frady*, contrary to the present case, the *defendant was required to carry the burden of showing prejudice* because of his own procedural default. Thus, the manner in which the Court in *Frady* chose to review the evidence has no bearing upon the issue in the present case. This is further made obvious by the fact that

Franklin was decided three years after the *Frady* decision. Despite this obvious difference as to the burden of proof and the standard of review, the petitoner nevertheless insists that *Frady* is pertinent to the present inquiry because it insists the Court recognized the feasibility of the inquiry concerning whether or not the defendant had been prejudiced by the erroneous instruction. Petitioner's reasoning is clearly flawed, since, as noted, due to the procedural default, *Frady* is founded upon principals not applicable to the present case, i.e. the defendant there had the burden of establishing prejudice. Nevertheless, even if the rationale of *Frady* were to be applied, it would have no bearing upon the outcome of the present case for obvious reasons.

First, the Court in *Frady* expressly emphasized that even under the procedural disadvantage imposed upon the defendant, the result would be different had it not been for *Frady's* utter failure to come forward with a colorable claim that he acted without malice even though the Court noted that *Frady* himself *testified* at the trial. That is a far cry from the present case, where *respondent Clark did not testify* but to the contrary presented medical proof that as a result of amnesia he had no way of relating what, in fact, occurred if, in fact, he was the one who committed the acts charged. Thus, petitioner, unlike *Frady*, had no means of explaining or coming up with an explanation of the events, and since he did not testify he was under no burden to present an account of the events which would raise an issue as to the circumstances. Respondent was entitled to rely solely and alone upon the presumption of innocence and the State's duty to prove each and every element of the offense beyond a reasonable doubt.

Furthermore, even though he could not testify about the deaths, the respondent attempted to show that if, in fact, he killed the victims he had no memory of the events and no means of showing how or why it occurred, and he attacked the credibility of the State's witnesses, showing that (1) the only eyewitness was impeached and contradicted in her testimony, (2) that rather than the deaths occurring simply as a result of an unprovoked and simply shooting, in fact they resulted from

some type of fight, and (3) the victim was in possession of a gun and there simply was no way to say beyond a reasonable doubt who provoked whom or how or why the deaths occurred.

In addition, the Court in *Frady* reasoned that since the jury found the accused guilty of first degree or premeditated murder, that this necessarily included a finding of malice and that the jury must, therefore, have found passion or provocation irrespective of the defective jury charge. In the present case, however, this issue has now been addressed directly by the Tennessee Supreme Court in its December 30, 1985, decision in *State* v. *Martin*, supra. There, as pointed out above, the Tennessee Supreme Court made a clear distinction between the elements of premeditation and malice. Even though the accused in that case was convicted of a deliberate premeditated murder, *the Court in Martin reversed the conviction based upon erroneous jury instructions which are identical to those in the present case*. The Court did so while stating that the jury had before it sufficient evidence to justifiably find premeditation and deliberation. Despite the finding of a deliberate premeditated killing, the Court held that malice was a separate issue and that the instructions, given to the jurty created a rebuttable presumption of malice which violated the U.S. Supreme Court's holdings in *Sandstom* and *Francis*, and the Court concluded that it could not say the error was harmless. Thus, the Tennessee Supreme Court itself has refuted petitioner's theory and has affirmatively held that under Tennessee law a conviction of the higher offense of first degree murder which includes premeditation and deliberation does not mitigate a *Sandstom* error involving a presumption of malice.

The Tennessee Supreme Court in *Martin* went on even further to hold that, the instructions as to the definition of malice itself were erroneous. Even though an adequate definition of the term malice was given in the portion of the jury charge relating to second degree murder, the Court concluded that this was not sufficient to cure the error caused by the failure to adequately define malice in the portion of the charge relating to first degree murder. The Court found that the instructions could have caused the jury to find the accused guilty of first

degree murder by looking only to the instructions related to first degree murder without regard to the instructions on second degree murder, and *also could have caused a reasonable juror to believe that the accused has the burden of proof as to the element of malice.* The Court in *Martin* specifically stated,

> *Malice in an essential element of both murder in the first degree and murder in the second degree.* It may be inferred by the trier of fact from the use of a deadly weapon. *Sikes* v. *State*, 524 S.W.2d 483, 485 (Tenn. 1975). In that connection, however, in the jury instructions on murder in the first degree all that the trial judge told the jury concerning the element of malice was that the State must prove beyond a reasonable doubt:
>
> > '(2) that the killing was malicious; that is, *that the defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse.* If it is shown beyond a reasonable doubt that the alleged victim was killed, *the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption; . . .*'
>
> In the section of the charge dealing with murder in the first degree, this was the only instruction or explanation given with respect to the element of malice. The term was not further defined. In a separate section on murder in the second degree, full explanations of malice, express and implied were given.
>
> . . . Since the decision of the Supreme Court of the United States in the case of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) the use of the term 'presumption' in jury instructions has been constitutionally suspect, except for the presumption of innocence. The Court reiterated the principles of the *Sandstrom* case in the recent decision of *Francis* v. *Franklin*, 471 U.S. _____, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), emphasizing that *no element of a criminal offense is to be presumed, and* that *jury instructions must not cause a reasonable juror to believe that the accused has the burden of proof as to any element* of the offense on trial.
>
> . . . Nevertheless, we are of the opinion that *the charge on malice contained in the first degree murder instructions, standing alone, was inadequate.* It did not use the term

> 'inference,' but instead used 'presumption.' It did not explain that rebuttal could be established by evidence from the State or from the accused. *It contained an inadequate explanation of the term 'malice.'*
>
> . . . We are of the opinion that a reasonable juror could have misunderstood the instructions on malice, and that they were not constitutionally sufficient in light of *Sandstrom* and *Francis*, supra.
>
> . . . Because of the closeness of the issues and *because the proof of necessity required the jury to draw inferences and to decide questions of credibility, we cannot say that the error in this case was harmless beyond a reasonable doubt.* Accordingly, we are constrained to reverse the judgment of the trial court and to remand this cause for a new trial. (Emphasis added).

In footnotes to its Opinion, the Court in *Martin* further emphasized:

> [2]In the first degree murder cases as well as those in the second degree, *malice may be either express or implied, but the instructions given here make no such explanation. See Turner* v. *State*, 119 Tenn. 663, 108 S.W. 1139 (1907).
>
> [5]Even though some repetition or cross-references may be involved, *in our opinion the court's instructions as to each offense defined for the jurors to consider should be complete within themselves.* In Tennessee the jury instructions in felony cases must be reduced to writing and, after being read orally, delivered to the jurors for use in their deliberations. Rule 30(c) T.R.C.P. In the present case the only definition of 'malice,' express or implied, was contained in the instructions on murder in the second degree. (Emphasis added).

Each of the errors found by the Court in *Martin* apply equally to an identical instruction on malice given in respondent's case, including the fact that the presumption of malice stated in the isolated section of the portion of the charge related to first degree murder could have been misunderstood by a reasonable juror as shifting the burden to the accused to rebut the presumption of malice.

In determining that the erroneous instructions were not harmless, the Court in *Martin* specifically looked to the fact

that the credibility of the witnesses and the inferences to be drawn from the proof were jury issues and cannot be disposed of by a presumption and the burden of disproving malice cannot be shifted to the accused. It is true that the Court did also state that the issues were close, nevertheless from a review of the overwhelming evidence presented by the State as outlined by the Court in the *Martin* decision, it is clear that they were close only in the sense that the accused testified in his own behalf to give a different view of his intent, even though, as the Court emphasized, his statement of the facts was wholly and totally inconsistent with and *contradicted by the numerous eyewitnesses* to the offense. In other words, it is only because of the accused's own testimony that any conflict was created in the evidence whereas in the present case because of the defendant's amnesia and mental illness, he was unable to even recall being at the scene and thus, could not present a differing version of the facts. Certainly, the accused could not lawfully be prejudiced by the fact that he has no recollection of the events and that he exercised his right not to testify and depended upon his right to attack the credibility of the State's evidence and to rely upon the presumption of innocence.

V.

RESPONDENT'S EVIDENCE OF INSANITY CLEARLY RAISED AN ISSUE AS TO HIS ABILITY TO FORM THE INTENT NECESSARY TO COMMIT THE CRIME.

Inexplicably the State argues that the evidence of the issue of intent has no relation to respondent's defense of insanity because the State says his defense was volitional rather than cognitive. This attempt to distinguish between volition and cognition in this context is wholly erroneous. Defendant's doctors testified that in their opinion he was suffering from mental illness which made him unable to conform his conduct to the requirements of the law that he was charged with violating (J.A. 87, 122). This was in conformance with the Tennessee law of insanity as announced by the Tennessee Supreme Court in its landmark case of *Graham* v. *State*, 547 S.W.2d 531 (1977) wherein the Court disregarded the long—standing "right from wrong" *M'Naughten* test of insanity and replaced it with the

ALI Model Penal Code test that holds that a person is not legally responsible for his criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. The *Graham* Court specifically noted that this rule combined the essential elements of cognition, volition and capacity to control behavior in a fashion that "is essentially a refinement and restatment of the full *M'Naughten* rule." *Graham*, supra at p. 541.

Construing this doctrine, the Tennessee Court of Criminal Appeals in *Burns* v. *State*, 591 S.W.2d 780 (1979) stated that

> "The question to be determined on the issue of settled insanity is whether '. . . as a result of mental disease or defect the accused lacked substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.' *Graham* v. *State*, 47 S.W.2d 531 (Tenn. 1977), *which in essence would mean that the accused was unable to form the intent to commit the crime.*" (Emphasis added).

Thus, the Court recognized that, whether deemed volitional or cognitive, the essence of a defense of insanity and inability to conform one's conduct to the requirements of the law is that the accused is unable to form the intent necessary to commit the crime. Indeed, this is the very basis for any insanity defense. This is likewise clear from the very early Tennessee case of *State* v. *Anderson*, 2 Tenn. 6 (1804) wherein the Court held that "the idea of *volition or an intent* to kill includes malice prepense," equating volition with the intent to kill necessary for malice aforethought. As stated in Corpus Juris Secundum, *Criminal Law*, § 1 at p. 7 under Criminal Intent,

> "In criminal law, *'intent' means* a state of mind which willingly consents to the act that is done or *free will choice, or volition* in the doing of the act; it means that the act is *voluntary* and that it precedes *from a mind free to act.* (Emphasis added).

Likewise, C.J.S., *Criminal Law*, § 29 at p. 99, defines voluntary act as "All crimes of which intent is a necessary element must be *voluntary*, that is, *they must proceed from the will*,

from a mind free to act, and it is in that sense that a criminal act may properly be said to be done with design, purpose or intent." Accordingly, it is obvious that the State misconstrues the very essence of the law relating to insanity and the particular defense interposed by the accused in the present case. The ability to freely and voluntarily commit the act charged is the very essence of the insanity defense, since a criminal act in order to be accomplished with design, purpose or intent must be "voluntary." It is apparent that *the presumption of malice* contained in the erroneous jury *instructions* in this case, which *informed the jury that it should presume such intent* from the mere fact of the killing, was clearly erroneous, highly prejudicial and *placed the jury in the position of having to disregard the very instructions given them in order to find the accused not guilty by reason of insanity.* There could be no clearer evidence of prejudice under any standard and it would be impossible to conclude that the error was harmless.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

For Publication
December 30, 1985

STATE OF TENNESSEE,

Appellee,

v.

WILLIE JAMES MARTIN,

Appellant.

Shelby Criminal
Hon. Arthur T. Bennett, Judge

For Appellant:
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Attorney General & Reporter

Wm. Barry Wood
Assistant Attorney General

Filed
Dec 30 1985
Jewel Redden, Clerk

OPINION

REVERSED AND REMANDED. HARBISON, J.

In a two-count indictment appellant was charged with murder in the first degree, the first count charging felony-murder during an attempted robbery and the second count charging deliberate, malicious, willful and premeditated homicide.

The jury acquitted appellant of the felony-murder charge but found him guilty on the second count of pre-meditated murder.

At a separate sentencing hearing appellant was sentenced to death by electrocution.

Among several issues presented on appeal, appellant challenges legal sufficiency of the convicting evidence.

The victim of the homicide was Alvin Griffin, who was forty-five years of age. He was shot to death by appellant at about 9:30 p.m. on the evening of November 1, 1980, on Calhoun Street in Memphis. Mr. Griffin was the treasurer of a Masonic lodge chapter, and he had attended a meeting of the lodge just prior to his fatal encounter with appellant.

The lodge hall fronted on the north side of Calhoun Street, an east-west thoroughfare, the building being situated a short distance to the east of the intersection of Calhoun Street and St. Martin, which runs north and south. Just to the west of the lodge building was a small printing shop, and then an establishment known as Ann's Grill. Just west of this place of business was a small vacant lot which was situated at the actual intersection of the two streets.

After leaving the lodge hall, Mr. Griffin took two briefcases to his automobile, which was parked near the southwest corner of the intersection. He then told a friend that he intended to return to the lodge for a short time, and it was during his attempt to do so that he was encountered by appellant on the street in front of Ann's Grill.

Appellant was thirty-six years of age and had been living in St. Louis for several years prior to the summer of 1980. He had returned a few months prior to the night in question, and on that night he had left the residence where he was staying and had visited two other bars or restaurants before going to Ann's Grill. He was carrying a loaded revolver, claiming that he was doing so to keep the weapon away from a younger brother who he feared might use it improperly. Griffin was unarmed.

As appellant emerged from Ann's Grill there was an encounter between him and Griffin. Four eyewitnesses testified that they saw the two men struggling, and several of them testified

that Griffin was urging appellant to let him go. It appeared to the witnesses that appellant was attempting to pull Griffin around the corner of Calhoun Street onto St. Martin. Appellant drew his weapon, struck Griffin in the head with it and then fired a shot at point-blank range which entered Griffin's left ear and penetrated the brain. Griffin died a short time later, apparently without regaining consciousness. Appellant fled the scene on foot. Two witnesses testified that he was carrying in his hands some object which they thought to be a paper bag that he had seized from Griffin. One witness followed him in her automobile and testified that after he ran around a corner, he put on a different coat or jacket and pulled his trouser legs from inside his boots and lowered them to cover the boots. She testified that he was laughing and joking with some other companions.

Appellant denied these allegations and testified that the shooting was entirely accidental. He said that Griffin accosted him and stated that he felt that the two men must have met previously. Appellant denied having ever seen or met Griffin before, but he said that their encounter grew increasingly hostile and that Griffin grabbed him by his coat lapel. He said that the two men were shoving each other and that since Griffin was the larger man appellant drew his pistol and struck his assailant. When he tried to strike him a second time the pistol accidentally discharged, and appellant fled.

Appellant had a prior criminal record, a conviction for murder in the second degree in 1968. Mr. Griffin was apparently an exemplary citizen and a respected member of his lodge. The evidence reveals no prior criminal record or misconduct whatever on his part.

The two briefcases which Mr. Griffin had carried from the lodge were found locked in his automobile after he had been taken to the hospital. Neither his wallet nor any other property belonging to him was taken by appellant, as far as the record indicates, except that two witnesses indicated that they saw appellant seize or take something from Griffin which they

thought to be a paper bag. Appellant denied this and said that he simply had his hat in his hand as he was running from the scene.

The issues were sharply drawn and the credibility of both appellant and the State's witnesses presented a classic question for determination by the jury. Apparently having doubt that an attempted robbery had occurred, the jury acquitted appellant on the felony-murder count but found him guilty of premeditated murder.

While the evidence was somewhat close on the question of premeditation and malice, nevertheless we are of the opinion that it was sufficient for submission to the jury. Premeditation is a question of fact to be determined by the jury from all the circumstances surrounding the homicide. *Houston* v. *State*, 593 S.W.2d 267, 273 (Tenn. 1980). Some of the circumstances shown here which in other cases have been found sufficient to support a finding of premeditation are: (1) the victim was retreating or attempting to escape when shot, *Everett* v. *State*, 528 S.W.2d 25, 28 (Tenn. 1975); (2) the victim was unarmed and offered no provocation, *State* v. *Bullington*, 532 S.W.2d 556, 560 (Tenn. 1976); and (3) the accused was cool and calm immediately after the homicide, having been seen by one witness to be laughing and joking with companions, *Sneed* v. *State*, 546 S.W.2d 254, 258 (Tenn. Crim. App. 1976). The bullet which killed the victim was fired from point-blank range, as close as one inch according to the testimony of a pathologist. Appellant had struck the victim at least once prior to shooting him. Repeated blows or shots may support an inference of premeditation. *See Houston* v. *State*, 593 S.W.2d 267, 273 (Tenn. 1980). It is also possible that the jury could have found that during the struggle appellant decided to kill the victim, only a moment of time being required between the plan to kill and its execution. *Clarke* v. *State*, 218 Tenn. 259, 402 S.W.2d 863, 868 (1966).

We are unable to conclude as a matter of law that the evidence as to premeditation and willfulness is insufficient. In our

opinion jury questions were presented as to all of the elements of murder in the first degree.

Since the proof of guilt was highly controverted, however, the jury instructions on the elements of murder in the first degree were particularly important, especially those involving the element of malice.

Malice is an essential element of both murder in the first degree and murder in the second degree.[1] It may be inferred by the trier of fact from the use of a deadly weapon. *Sikes* v. *State*, 524 S.W.2d 483, 485 (Tenn. 1975). In that connection, however, in the jury instructions on murder in the first degree all that the trial judge told the jury concerning the element of malice was that the State must prove beyond a reasonable doubt:

> "(2) that the killing was malicious; that is, that the defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse. If it is shown beyond a reasonable doubt that the alleged victim was killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption; . . ."

In the section of the charge dealing with murder in the first degree, this was the only instruction or explanation given with respect to the element of malice. The term was not further defined. In a separate section on murder in the second degree, full explanations of malice, express and implied, were given.[2] The Court there repeated the instructions that all homicides are presumed to be malicious in the absence of evidence which would rebut the "implied presumption." In that section there was an additional sentence, stating that the presumption could

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[1] T.C.A. §§ 39-2-201, 202, 211.

[2] In first degree murder cases as well as those in the second degree, malice may be either express or implied, but the instructions given here make no such explanation. *See Turner* v. *State*, 119 Tenn. 663, 108 S.W. 1139 (1907).

be rebutted by either direct or circumstantial evidence regardless of whether the evidence was offered by the defendant or by the State. In brackets on the form instructions which were handed to the jurors was a further instruction concerning a presumption of malice sufficient to support a conviction of murder in the second degree where the homicide resulted from the use of a deadly weapon. Here it was stated that "there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances."[3]

There followed other instructions as to the included offense of voluntary manslaughter and involuntary manslaughter, and then general instructions concerning the presumption of innocence and reasonable doubt.

The proposed jury instructions were discussed in detail by counsel and the trial judge in the absence of the jury, but the foregoing instructions with respect to malice were not objected to at the trial nor raised as issues in the motion for a new trial. Nor were any special requests for instructions directed to the issue of malice. Ordinarily, therefore, any issue regarding these instructions would be deemed to be waived.

In death penalty cases, however, this Court is required by statute to review the sentence and to consider significant errors whether or not called to the attention of the trial court. *See State* v. *Duncan*, ____ S.W.2d ____ (Tenn. 1985) (released for publication at Nashville on September 9, 1985); *see also* T.C.A. § 39-2-205(a).

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[3] As stated later in this opinion, the term "presumption" should no longer be used. A permissible inference of malice could be drawn from use of a deadly weapon in first degree murder cases as well as in second degree cases. *Sikes* v. *State*, 524 S.W.2d 483, 485 (Tenn.1975). The instructions given here, based on Tennessee Pattern Instructions—Criminal No. 20.01, do not so indicate except insofar as that pattern instruction states that all homicides are "presumed" to be malicious unless the "implied presumption" is rebutted.

Since the decision of the Supreme Court of the United States in the case of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) the use of the term "presumption" in jury instructions has been constitutionally suspect, except for the presumption of innocence. The Court reiterated the principles of the *Sandstrom* case in the recent decision of *Francis* v. *Franklin*, 471 U.S. ____, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985), emphasizing that no element of a criminal offense is to be presumed, and that jury instructions must not cause a reasonable juror to believe that the accused has the burden of proof as to any element of the offense on trial.

In *State* v. *Bolin*, 678 S.W.2d 40, 44-45 (Tenn. 1984) this Court warned that trial judges should avoid the use of the term "presumption" in instructing juries in criminal cases except for the presumption of innocence. There the Court said:

> "In its place juries may be instructed that a permissible inference may or may not be drawn of an elemental fact from proof by the State of a basic fact,[4] but that such inference may be rebutted and the inference places no burden of proof of any kind upon defendant."

The Committee of the Tennessee Judicial Conference responsible for preparing pattern instructions for use in Tennessee trial courts has promulgated Criminal Pattern Instruction No. 37.19 (Tennessee Pattern Jury Instructions, 1985 Supp.) which emphasizes these principles. That instruction was not given in the present case. However, in fairness to the trial judge, it should be pointed out that the present case was tried in 1983 prior to the opinion of this Court in *Bolin*, *supra*.

Nevertheless, we are of the opinion that the charge on malice contained in the first degree murder instructions, standing alone, was inadequate. It did not use the term "inference," but instead used "presumption." It did not explain that rebuttal

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[4] Of course, inferences can be properly drawn from proof offered by the defendant as well, where the defense elects to introduce evidence.

could be established by evidence from the State or from the accused. It contained an inadequate explanation of the term "Malice."[5] It was preceded by general instructions that the State must establish each of the elements of the offense beyond a reasonable doubt. Other general instructions repeated that proposition although not nearly to the extent as did the instructions in *Bolin*, *supra*. Without some further explanation such as that contained in T.P.I. 37.19, *supra*, we are of the opinion that a reasonable juror could have misunderstood the instructions on malice, and that they were not constitutionally sufficient in light of *Sandstrom* and *Francis*, *supra*.

Because of the closeness of the issues and because the proof of necessity required the jury to draw inferences and to decide questions of credibility, we cannot say that the error in this case was harmless beyond a reasonable doubt. Accordingly we are

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[5] Even though some repetition or cross-references may be involved, in our opinion the court's instructions as to each offense defined for the jurors to consider should be complete within themselves. In Tennessee the jury instructions in felony cases must be reduced to writing and, after being read orally, delivered to the jurors for use in their deliberations. Rule 30(c) T. R. Crim. P. In the present case the only definition of "malice," express or implied, was contained in the instructions on murder in the second degree.

We note that the instructions given by the trial judge in this case followed former T.P.I.-Crim. 20.01 verbatim, but to the extent that this pattern instruction contains no further explanation of malice and to the extent that it misues the term "presumption" as heretofore indicated, it is expressly disapproved, and it should no longer be followed. This pattern instruction was revised in April 1985, and the new form appears to meet the requirements of this opinion. These pattern instructions are not officially approved by this Court or by the General Assembly and should be used only after careful analysis of the case on trial. They are merely "patterns" or suggestions and serve no other purpose. It is the responsibility of the trial judge to prepare the jury instructions, and while previously printed forms may be convenient, these must be revised or supplemented if necessary in order to state the applicable law fully and accurately.

constrained to reverse the judgment of the trial court and to remand this cause for a new trial.

We have considered all of the other issues raised in the brief of appellant, and we find them to be without merit. As previously stated, we are of the opinion that the convicting evidence was sufficient to present an issue for determination by the jury with respect to murder in the first degree. This Court has previously passed upon the constitutional attacks upon the death penalty made by appellant and upon the question of individual *voir dire* of prospective jurors. *See generally State* v. *Caldwell*, 671 S.W.2d 459 (Tenn. 1984), *cert. denied*, 105 S. Ct. 231 (1984); *State* v. *McKay*, 680 S.W.2d 447 (Tenn. 1984); *State* v. *Workman*, 667 S.W.2d 44 (Tenn. 1984).

At the sentencing phase a member of the staff of the Criminal Court Clerk testified about the prior conviction of appellant for murder in the second degree. Inadvertently, and almost incidentally in her testimony, she referred to the fact that he had been indicted for murder in the first degree but was convicted of murder in the second degree. Appellant assigns his testimony as error, but in our opinion the testimony of the clerk was nothing more than a part of identifying her records. This was not an attempt by the State to prove some prior accusation, arrest or indictment such as was found to constitute error in *State* v. *Buck*, 670 S.W.2d 600 (Tenn. 1984), *State* v. *Teague*, 645 S.W.2d 392 (Tenn. 1983) and other cases. Nevertheless, upon retrial, the reference to the fact that the accused had been indicted for a higher offense and convicted of a lesser offense should be avoided.

Appellant offered two special requests with respect to his plea of self-defense. In our opinion the instructions given by the trial judge adequately covered this issue. Nor do we find any error in permitting a witness to testify as to her sensory perception or conclusion that appellant was attempting to pull Mr. Griffin around the corner during the course of their struggle.

All of the issues raised by appellant are overruled except those pertaining to the jury instructions referred to above. The judgment of the trial court is reversed and the cause is remanded for a new trial at the cost of the State.

/s/ _____
WILLIAM J. HARBISON, J.

Cooper, C.J., Fones, J., and
McLemore, Sp. J., concur;
Brock, J., files partial dissent.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

For Publication
December 30, 1985

STATE OF TENNESSEE,

Appellee,

v.

WILLIE JAMES MARTIN,

Appellant.

Shelby Criminal
Hon. Arthur T. Bennett, Judge

OPINION CONCURRING IN PART;
DISSENTING IN PART

With respect to the constitutionality of the death penalty, I adhere to the views expressed in my dissenting opinion in *State* v. *Dicks*, Tenn., 615 S.W.2d 125, 132 (1981); in all other respects I concur in the opinion of the Court.

/s/ _____
BROCK, J.

Filed
Dec 30 1985
Jewel Redden, Clerk